

**United States Department of Labor
Employees' Compensation Appeals Board**

C.C., Appellant

and

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**

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**Docket No. 18-1229
Issued: March 8, 2019**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 1, 2018 appellant filed a timely appeal from an April 25, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish hearing loss causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On October 3, 2017 appellant, then a 55-year-old planner/estimator, filed an occupational disease claim (Form CA-2) alleging that he suffered bilateral hearing loss as a result of his federal

¹ 5 U.S.C. § 8101 *et seq.*

employment duties, which included working around loud noise/tools such as grinders and deck crawlers. He indicated that he first became aware of his claimed hearing loss and realized its relation to his federal employment on December 1, 2016.

By development letter dated October 11, 2017, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. By separate letter of even date, OWCP requested that the employing establishment submit evidence in its possession relative to appellant's alleged noise exposure. It afforded both parties 30 days to submit the necessary evidence.

OWCP received a position description and employing establishment audiograms dated from October 6, 1987 to December 6, 2016.

In an October 18, 2017 statement, appellant noted that, from November 1988 to the present, he had been employed as a pipefitter apprentice, pipefitter journeyman, pipefitter supervisor, nuclear inspector, second level supervisor (zone manager), production/radcon coordinator, and nuclear planner/estimator. He explained that he was exposed to industrial noise from grinders, deck crawlers, needle guns, pneumatic tools, air hoses, pneumatic freeze seals, air scribes, vibratools, sawsalls, chain hoists, cranes, forklifts, lifting equipment, sirens, alarms, and end prep machines. Appellant explained that these sources of noise were constant and continuous at work.

Appellant confirmed that hearing protection in the form of earplugs and earmuffs were available and used when needed. He indicated that his hearing loss was first reported in December 2016 after "rebaselining" of his hearing. Appellant confirmed that he was in a hearing conservation program with annual testing and he remained exposed to industrial noise, but at a reduced level.

OWCP referred appellant, a statement of accepted facts (SOAF), and an otologic evaluation questionnaire for a second opinion evaluation with Dr. Julie Gustafson, a Board-certified otolaryngologist, on November 30, 2017. The SOAF indicated that appellant continued to be employed from 1987 to the present at the employing establishment and was exposed to noise for eight hours per day.

In a report dated January 11, 2018, Dr. Gustafson reviewed the SOAF and completed the questionnaire. She noted appellant's history of work, including positions where he was exposed to noise, and position changes where there was less noise. By way of appellant's history, earlier in his career he had worked as an oiler where he was exposed to noise which required hearing protection. Later, he indicated his job as Radcon coordinator exposed him to noise 70 percent of the time. Subsequently, working as a nuclear planner and estimator for eight years was mostly office work, but appellant indicated that his office was within a machine shop and the doors were left open. Dr. Gustafson diagnosed sensorineural hearing loss and indicated that he had a "possible contribution to decreased hearing from occupational noise exposure." She further related that appellant had worked within noise of sufficient intensity and duration to have caused a noise-induced hearing loss. Dr. Gustafson explained that he began his work at the employing establishment with near perfect hearing and his changes in the high frequencies at a younger age

were consistent with a noise-induced hearing loss, but it did not persist at levels that were measurable on later occupational tests. She also noted that appellant's loss over the last year, within the low to mid to high frequencies, was inconsistent with a noise-induced loss. Dr. Gustafson concluded that "there has been [in]significant change in hearing due to occupational noise exposure that would be greater than changes from presbycusis alone." In answer to the question "Please provide all other relevant historical facts (such as noise exposure) emotional disorders, system diseases (such as diabetes), local infections, ototoxic drug usage, surgery, etc. as they relate to this individual's hearing loss sensorineural or conductive." Dr. Gustafson responded that "there are no identified factors to account for [appellant's] hearing loss, as seen on the current evaluation. The prior changes in high frequency, seen on prior occupational tests performed when [he] was no longer working within noise, are consistent with presbycusis." She checked a box marked "not due" regarding whether she believed that the hearing loss was due to appellant's federal noise exposure, but added the rationale that supporting her opinion is the close evaluation of his occupational audiograms and his history of noise exposure within the workplace.

Dr. Gustafson reviewed appellant's audiogram which demonstrated at 500, 1,000, 2,000, and 3,000 hertz decibel losses of 25, 30, 20, and 20, respectively on the right and 25, 30, 25, and 20 respectively on the left. The audiogram was performed by audiologist Rachel Shannon and calibrated on June 7, 2017. Dr. Gustafson explained that appellant's occupational audiograms reflected a minimal change in hearing within the high frequencies, which did not change to a level where there was measurable loss on a consistent basis by the time he moved into a position where he no longer had noise exposure. She noted that there was a pattern of a mild decrease in hearing, more in the high frequencies than low within the occupational testing.

By decision dated January 30, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish hearing loss causally related to the accepted factors of his federal employment.

On February 20, 2018 appellant requested a review of the written record. He indicated that he disagreed with the January 20, 2018 decision denying his claim. Appellant specifically noted that Dr. Gustafson indicated that he was no longer exposed to noise at work after he transferred positions, which was incorrect, as he continued to be exposed to noise at work, but at a reduced level. He also indicated that Dr. Gustafson was concerned that the testing had not been performed appropriately, in which case he believed that additional testing was warranted.

By decision dated April 25, 2018, OWCP's hearing representative affirmed the January 30, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA² has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the

² *Id.*

employment injury.³ These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.⁴

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed, or stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁵

Neither the condition becoming apparent during a period of employment, nor the belief of the employee that the hearing loss was causally related to noise exposure in federal employment, is sufficient to establish causal relationship.⁶ Causal relationship is a medical issue and the evidence required to establish causal relationship is rationalized medical opinion evidence.⁷ Rationalized medical opinion evidence is medical evidence which includes a physician's reasoned opinion on whether there is causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁹

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP referred appellant to Dr. Gustafson for a second opinion examination and a determination as to whether he had employment-related hearing loss. The Board finds that her report is internally inconsistent.¹⁰ The SOAF provided to the second opinion physician related

³ Gary J. Watling, 52 ECAB 278-79 (2001); Elaine Pendleton, 40 ECAB 1143, 1145 (1989).

⁴ Michael E. Smith, 50 ECAB 313, 315 (1999).

⁵ T.J., Docket No. 17-1850 (issued February 14, 2018).

⁶ D.S., Docket No. 16-0903 (issued September 8, 2016); Lourdes Harris, 45 ECAB 545, 547 (1994); John W. Butler, 39 ECAB 852 (1988).

⁷ Elizabeth H. Kramm, 57 ECAB 117, 123 (2005).

⁸ Leslie C. Moore, 52 ECAB 132, 134 (2000).

⁹ *Id.*

¹⁰ See C.T., Docket No. 16-1641 (issued March 2, 2017).

that appellant worked a number of jobs from 1987 to present in which he had been exposed to a number of sources of occupational noise. Dr. Gustafson related several times in her report that he had been exposed to noise of sufficient intensity and duration within his work at the employing establishment to have contributed to a noise-induced hearing loss. As her report is internally inconsistent it is of diminished probative value.¹¹

In light of the inconsistent conclusions provided by Dr. Gustafson, this case must be remanded for further development.¹² Once OWCP undertakes development of the record, it must procure medical evidence that will resolve the relevant issues in the case.¹³ The Board will, therefore, remand the case to OWCP for clarification from Dr. Gustafson as to whether appellant sustained hearing loss causally related to the accepted factors of his federal employment. Following this, and such other further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹¹ *S.K.*, Docket No. 18-0836 (issued February 1, 2019); *E.D.*, Docket No. 17-1064 (issued March 22, 2018).

¹² The Board notes that Dr. Gustafson had noted that, while appellant had worked as a nuclear planner and estimator for the past eight years, his office was within a machine shop and his office door was left open. However, Dr. Gustafson noted multiple times in her report that he was no longer exposed to noise after his transfer to the nuclear planner and estimator position. This factual history is incorrect, as the SOAF indicates that appellant worked for the employing establishment from 1987 to the present and was exposed to noise for eight hours per day.

¹³ *See K.G.*, Docket No. 17-0821 (issued May 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: March 8, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board